Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1993

STATE OF NEBRASKA,

Petitioner,

v.

ROY T. HUGHES,

Respondent.

Petition For Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a confession to a criminal act by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant bears adequate indicia of reliability to render it admissible under the Sixth Amendment Confrontation Clause?

2. Whether evidence tending to corroborate the accuracy of an unavailable declarant's statement, as opposed to evidence allowing speculation as to the declarant's state of mind at the time the statement was made, is appropriately considered in evaluating the admissibility of such a statement under the Confrontation Clause?

PARTIES TO THIS ACTION

The parties to these proceedings are the petitioner, the State of Nebraska, and respondent, Roy T. Hughes.

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ROY T. HUGHES,

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v.

DON STENBERG,

Respondent.

Petition For Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

The petitioner, State of Nebraska, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Nebraska Supreme Court.

OPINIONS BELOW

The petitioner seeks a writ of certiorari from the opinion of the Nebraska Supreme Court filed in *State of Nebraska v. Roy T. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993) (App. 1.)

The ruling of the trial court, the District Court for Douglas County, Nebraska, is not reported but was transcribed and is reproduced in the Appendix. (App. 17.)

JURISDICTION

(i)

The opinion in question was filed December 30, 1993.

(ii)

No rehearing before the Nebraska Supreme Court was sought by the petitioner nor have any extensions of time to file this petition been granted.

(iii)

The jurisdiction of this Court to review the judgment of the highest court of a state is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS APPLICABLE

The Constitution of the United States, Amendment VI.

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him;"

Neb. Rev. Stat. § 27-804(1) and (2)(c) (1989).

(1) Unavailability as a witness includes situations in which the declarant:

(a) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement;

* * *

(2) Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(c) A statement which . . . so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true. . . .

STATEMENT OF THE CASE

The respondent, Roy T. Hughes (hereinafter "Hughes") was convicted of the first degree murder of Forrest Pointer and the use of a firearm to commit a felony. Hughes was sentenced to life imprisonment for the homicide and 5-10 years imprisonment for the use of the firearm.

The declarant in question is Nolan Berry (hereinafter "Berry").

In the early morning hours of August 30, 1991, in Omaha, Nebraska, Forrest Pointer was observed in a confrontation with four other individuals (including Hughes and Berry) in which Hughes admits having fired a pistol at Forrest Pointer. No one appears to have been

injured in that incident. However, at approximately 5 a.m. that morning Forrest Pointer was found at another location, shot in the head. Forrest Pointer subsequently died of that wound.

In the course of investigating Forrest Pointer's killing the Omaha Police questioned Berry. Berry was given his *Miranda* rights and signed a rights waiver form prior to giving his statement. According to Berry's statement to police, after the initial confrontation Forrest Pointer left the scene in his vehicle. The remaining four individuals determined that they would all get in a car and go looking for Forrest Pointer. Eventually the four observed Forrest Pointer, drove slowly up to where he was standing, and Berry observed Hughes produce a pistol and shoot Forrest Pointer from the front seat of the vehicle they were occupying.

At trial one of the other individuals in the car with Hughes and Berry, a Michael Floyd, testified that he was with Hughes, Berry and another individual when Hughes first fired a pistol at Forrest Pointer, that after Forrest Pointer left that scene, the four decided to get in a car and go looking for Forrest Pointer. Floyd was driving. Floyd testified that when they found Forrest Pointer, he was standing near the trunk of a car parked on a public street. As they approached Forrest Pointer, Hughes produced a pistol and shot Forrest Pointer from the passenger side of the vehicle. As the shooting concluded, the cylinder from the weapon used by Hughes fell from the gun onto the street.

At the scene of Forrest Pointer's killing, Omaha police found a spent .38 caliber round, five live .38 caliber rounds, and a six-shot cylinder for a .38 caliber revolver.

At trial Berry refused to testify claiming his privilege against self incrimination. The trial court determined that Berry was thus "unavailable" as a witness. Over Hughes' objection, the prosecution offered and the trial court ultimately received testimony relative to Berry's earlier statement to Omaha police implicating himself and Hughes in Forrest Pointer's killing. See App. 17.

On appeal to the Nebraska Supreme Court, Hughes assigned as error the admission of Berry's statement as a violation of his rights under the Sixth Amendment's Confrontation Clause. The Nebraska Supreme Court reversed Hughes' conviction and remanded the matter for a new trial, holding that the introduction of Berry's statement violated the Confrontation Clause. "There is not enough indication of reliability and trustworthiness to obviate the need for cross-examination of the declarant." App. 15. No rehearing of the unanimous decision of that court was sought by the State of Nebraska.

REASONS FOR GRANTING THE WRIT

I.

This Court has recently granted a writ of certiorari on this issue.

On January 21, 1994, this Court granted a writ of certiorari to the Eleventh Circuit Court of Appeals to

consider the exact issue raised by Question number 1 in *Williamson v. United States*, No. 93-5256.

II.

A declaration against penal interest is presumptively reliable and by its nature carries indicia of reliability reflected by the long history, practice and acceptance of this firmly rooted exception to the rule against hearsay.

There presently exists a significant degree of tension between two lines of cases out of this Court.

First, are cases recognizing the appropriateness, under the Confrontation Clause, of the introduction of certain hearsay testimony such as *Ohio v. Roberts*, 448 U.S. 56 (1980), *California v. Green*, 399 U.S. 149, 157-159 (1970), *Dutton v. Evans*, 400 U.S. 74 (1970), *Chambers v. Mississippi*, 410 U.S. 284, 300-301 (1973), *States v. Matlock*, 415 U.S. 164 (1974).

Apparently holding to the contrary are cases such as *Douglas v. Alabama*, 380 U.S. 415 (1965), *Burton v. United States*, 391 U.S. 123 (1968), and in particular *Idaho v. Wright*, 497 U.S. 805 (1990).

We believe the Court will resolve those apparent conflicts in the context of a decision in *Williamson* or in this case. In so doing we believe the appropriate rule to be the one articulated in dissent by Justice Blackmun and joined by then-Justice Rehnquist in *Lee v. Illinois*, 476 U.S. 530 (1986), in which it was urged that a statement against penal interest, as the statement here in question surely was, does not violate the concerns of the Confrontation Clause.

We believe the conclusion of the Nebraska Supreme Court, in reliance upon *Lee v. Illinois*, that declarations against penal interest made to law enforcement personnel are **presumptively** suspect under a Confrontation Clause analysis ignores both the histor" and purpose of this firmly rooted exception to the rule against hearsay and the very dynamics of the situation in question. The law should never lose sight of common sense. One would think the **very last** situation in which an individual would volunteer personally incriminating information would be in the presence of the very individuals sworn to enforce our laws. Yet the conclusion of the Nebraska Supreme Court in this case appears to have lost sight of that reality in its effort to protect Hughes' rights under the Confrontation Clause.

III.

It is appropriate, when determining the reliability of the unavailable declarant's statement under the Confrontation Clause, to consider all evidence which would tend to corroborate the truthfulness and reliability of that statement.

The prosecution attempted to establish the reliability of Berry's statement to police by offering evidence which tended to corroborate the factual information conveyed. The Nebraska Supreme Court held that, under a Confrontation Clause analysis, evidence tending to corroborate the accuracy of the statement in question was irrelevant. That court held that only evidence of the declarant's state of mind when giving the statement in question, not the accuracy of the information conveyed by that statement,

was relevant to the Confrontation Clause inquiry citing *Idaho v. Wright*, 497 U.S. at 822. App ___.

We believe that limiting the inquiry into indicia of reliability solely to speculation as to the state of mind of the declarant, as opposed to also considering evidence tending to establish the actual accuracy of the statement in question, defies logic and justice. If a court can, in the face of corroborating evidence, conclude that the unavailable declarant's statement is accurate, then is it the declarant's state of mind when articulating the truth which should be considered irrelevant to the ultimate process in which we are engaged: The search for the truth.

CONCLUSION

We urge this court to grant the writ prayed for to clarify the availability of evidence firmly rooted in historically accepted exceptions to the rule against hearsay and attempt to resolve any confusion resulting from the two lines of cases discussed above.

Respectfully submitted,

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APPENDIX 1

244 Neb. 810 (1993)

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

State of Nebraska, Appellee,

v.

Roy T. Hughes, Appellant.

Case Caption

State v. Hughes

Filed December 30, 1993. No. S-92-1087.

Appeal from the District Court for Douglas County: Michael McGill, Judge. Reversed and remanded for a new trial.

Martin J. Kushner, of Kushner Law Office, for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

STATE V. HUGHES

NO. S-92-1087 – filed December 30, 1993.

Hastings, C.J., Boslaugh, White, Caporale, Fahrnbruch, and Lanphier, JJ., and Moran, D.J., Retired.

WHITE, J.

Roy T. Hughes appeals from jury verdicts finding him guilty of first degree murder and use of a firearm to commit a felony. Appellant, Hughes, was sentenced to life imprisonment on the murder conviction and 5 to 10 years' imprisonment on the firearm conviction. We reverse the judgment and remand the cause for a new trial.

Appellant alleges that the district court erred in (1) admitting into evidence an inculpatory out-of-court statement, (2) allowing the prosecution to improperly question a character witness, and (3) finding that sufficient evidence existed to support a guilty verdict. Our holding on appellant's first assignment of error is dispositive of the appeal, and our discussion therefore will be limited to those facts which are relevant to the admission of the out-of-court statement.

On August 30, 1991, Forrest Pointer was fatally shot. Prior to the shooting, at about 2:30 a.m. on August 30, Pointer had been in an altercation with appellant and three other individuals – Michael Floyd, Deandre Smith, and Nolan Berry – at the Tommie Rose Garden Apartments. Pointer waved a loaded shotgun at the four individuals, and Floyd later gave appellant a .22-caliber gun. Appellant testified that he fired the .22-caliber gun in the air and in the direction of Pointer to scare him away. An off-duty private security guard, who was present at the Tommie Rose Garden Apartments, made a 911 call regarding this altercation. According to the guard's testimony, while he was on the telephone with police, he heard gunshots and then watched Pointer leave the Tommie Rose Garden Apartments parking lot. Shortly after Pointer left the parking lot, the guard observed a white

car and a red car appear to follow Pointer. The guard did not see who was in either of those two cars.

According to appellant, after Pointer left, Floyd said he knew where Pointer lived, and the four men decided to go looking for Pointer. Appellant testified that they never found Pointer and that they returned to the Tommie Rose Garden Apartments.

Smith's testimony was similar to appellant's. According to Smith, after Pointer left the Tommie Rose Garden Apartments, the four men got into a red car driven by Floyd and went to look for Pointer. Smith testified that he saw appellant with a .22-caliber pistol while they were in the car. Smith testified that they never found Pointer.

In contrast, Floyd testified that they found Pointer. According to Floyd, when they found Pointer, he was standing by the trunk of his car on Spaulding Street. Floyd stated that he slowed down the car and that appellant reached under the seat, pulled out a gun, and shot Pointer. Floyd stated that Pointer was about 2 to 5 feet from their car when he was shot. Floyd testified that he did not know a gun was under the seat and did not know what had happened to the gun since the shooting. Floyd testified that after appellant fired the gun, the cylinder and bullets fell to the ground. Floyd stated that after the shot was fired, they drove back to the Tommie Rose Garden Apartments.

Pointer was found by his girl friend, Linda Bailey, in front of her house on Spaulding Street at about 5 a.m. on August 30. Pointer was brought by ambulance to St. Joseph Hospital, where he died later that afternoon. The

pathologist who performed an autopsy on Pointer testified that Pointer died as the result of a gunshot wound to the head. The pathologist testified that because of the discoloration around the wound, the shot must have been fired while the gun was within inches of, if not actually in contact with, Pointer's head. The pathologist testified that the wound was probably caused by a .38-caliber bullet; however, the pathologist did not conduct any specific tests to determine the actual size of the bullet removed from Pointer's head. At the scene of the shooting, police recovered one spent .38-caliber round, five live .38-caliber rounds, and a six-shot cylinder for a .38-caliber revolver.

Appellant's first assignment of error concerns the admissibility of an out-of-court statement made by Berry. Specifically, appellant contends that the statement did not fall within the hearsay exception for statements against penal interests and that its use violated his confrontation and due process rights under the U.S. and Nebraska Constitutions.

Berry did not testify at trial because he asserted his Fifth Amendment right against self-incrimination. Over defense counsel's timely objections, the trial court ruled that because of Berry's assertion, he was exempt from testifying and, therefore, unavailable within the meaning of Neb. Rev. Stat. § 27-804(1)(a) (Reissue 1989). The court permitted the prosecution to admit into evidence an out-of-court statement made by Berry on September 5, 1991. The court found that the statement fell within the hearsay exception regarding statements against penal interests. The following constitutes a recitation of the facts surrounding the three statements.

On September 4, 1991, at about 11:51 p.m., police brought Berry to the police station so they could interrogate him regarding the Pointer shooting. The officer who interrogated Berry stated that he read Berry his *Miranda* rights and that Berry signed a waiver of rights form. The officer testified that he talked with Berry for about 2 hours before he began tape recording Berry's statement. The officer further testified that during this 2-hour period, he told Berry that he, Berry, must have been the shooter. The officer stated that he said this to Berry because the officer wanted to scare Berry into making a statement. When the tape recorder was finally turned on, Berry made a statement in response to the officer's specific questions. The interrogation ended at 2:13 a.m. on September 5.

According to Berry's tape-recorded statement, the four men went to find Pointer after the first altercation. Berry stated that they found Pointer and that appellant shot Pointer from the front seat of a red car driven by Floyd. Berry stated that appellant fired several shots at Pointer and that Pointer was a few feet from the car when he was shot. Berry stated that he did not know where the gun came from or what had happened to it since the shooting.

On March 13, 1992, Berry returned to the police station and made a second statement. In this second statement, Berry told police that he had lied in his first statement because the police officers had told him that he, Berry, would be charged with the murder if he did not name somebody else for the crime. In this second statement, Berry also said that he witnessed part of the first altercation with Pointer, but that he did not go with

Floyd, Smith, and appellant to find Pointer. Berry stated that he did not witness the shooting and did not know whether appellant had shot Pointer.

On August 13, Berry made a third statement. This third statement was made at the offices of appellant's attorney. Berry gave this sworn statement in the presence of his mother, appellant's attorney, a court reporter, two private detectives, and a paralegal. In his third statement, Berry reiterated what he had told police in his second statement. According to Berry, he had lied during his first statement because he feared that the police would charge him with the murder. Berry claimed that he was not with Floyd, Smith, and appellant when they allegedly went after Pointer and that he did not see anybody shoot Pointer. The second and third statements were entered into evidence solely for the purpose of counteracting the court's decision to overrule appellant's objection to the admission of the first statement.

" '[I]n all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence. . . . ' " *State v. Thompson, ante* p. 375, 394, 507 N.W.2d 253, 267 (1993). Accord, *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993). See, also, *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993) (stating that the admissibility of hearsay evidence pursuant to an exception to the hearsay rule was no longer a matter within the discretion of the trial court); *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). " 'In a jury trial of a criminal case, whether an error in admitting or

excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.' " *Toney*, 243 Neb. at 244, 498 N.W.2d at 550 (quoting *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989)).

The State contends that Berry's statement falls within the hearsay exception for statements made against the declarant's penal interests. Section 27-804 provides that an out-of-court statement will not be excluded by the hearsay rule if (1) the out-of-court declarant is unavailable and (2) the statement is so contrary to the declarant's penal interests that a reasonable person in a similar position would not have made the statement unless he believed it to be true. § 27-804(1) and (2) (c); Proposed Neb. Evid. R. 804 (Tentative Draft 1973) (stating that the Nebraska rule is identical to Fed. R. Evid. 804 regarding statements against penal interests). For purposes of our analysis, we assume, first, that the declarant was unavailable to testify because he invoked his Fifth Amendment right against self-incrimination, and second, that the statement was against his penal interests because it tended to subject him to criminal liability.

A third element must be satisfied if the statement implicates a *defendant's* penal interests as well as the *declarant's* penal interests. This third element requires the court to examine the totality of the circumstances surrounding the making of the statement to determine whether they indicate that the statement is trustworthy. This third element is designed to satisfy the defendant's confrontation rights. See, *U.S. v. Boyce*, 849 F.2d 833 (3d

Cir. 1988); *United States v. Rasmussen*, 790 F.2d 55 (8th Cir. 1986).

The Confrontation Clause of the Sixth Amendment and art. I, § 11, of the Nebraska Constitution secure a defendant's right to confront and cross-examine witnesses brought against him. See *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) (applying the 6th Amendment to the states through the 14th Amendment). The purpose of cross-examination is to ensure that the trier of fact has a sufficient basis to assess the truthfulness of the evidence. *Lee v. Illinois*, 476 U.S. 530, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986); *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); *State v. Warford*, 223 Neb. 368, 389 N.W.2d 575 (1986); *State v. Roy*, 214 Neb. 204, 333 N.W.2d 398 (1983). The Confrontation Clause should be abrogated only when the evidence is sufficiently reliable and trustworthy that it obviates the need to explore the state of mind of the declarant. *White v. Illinois*, ___ U.S. ___, 112 S. Ct. 736, ___ L. Ed. 2d ___ (1992); *Roberts, supra; Roy, supra.*

The U.S. Supreme Court recognized the difficulty in merging the Confrontation Clause and the hearsay rules:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Roberts, 448 U.S. at 66. The analysis therefore requires a determination of whether the statement falls within a firmly rooted hearsay exception, and if it does not, then a determination of whether the statement has particularized guarantees of trustworthiness. Firmly rooted exceptions are presumptively reliable and trustworthy; therefore, inferring reliability of hearsay statements which fall within such an exception will not violate a defendant's confrontation rights. *Roberts, supra; U.S. v. Flores,* 985 F.2d 770 (5th Cir. 1993). However, the hearsay exception for statements made against the declarant's penal interests "defines too large a class for meaningful Confrontation Clause analysis." *Lee,* 476 U.S. at 544 n.5. See, also, *Flores, supra.*

Although the hearsay exception for statements against penal interests encompasses statements that may be inherently reliable, the exception also encompasses statements that are inherently unreliable. Particularly, statements made while the declarant is in police custody and in which the declarant implicates another party are highly suspect and presumptively unreliable. *Lee,* 476 U.S. at 541 (stating that "when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination"). Generally, the circumstances surrounding the making of these statements necessitate an exploration of the declarant's state of mind. It cannot be said, without a specific showing of trustworthiness, that such a statement should be admitted without an opportunity for cross-examination. See,

Lee, supra; Olson v. Green, 668 F.2d 421 (8th Cir. 1982), *cert. denied* 456 U.S. 1009, 102 S. Ct. 2303, 73 L. Ed. 2d 1305.

Unlike other exceptions to the hearsay rule, statements made in response to police interrogation generally do not have inherent guarantees of reliability and trustworthiness. For example, the spontaneity of an excited utterance reduces the risk of inaccuracies because the statement is not the result of a declarant's conscious effort to make a statement. See *Idaho v. Wright,* 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990). On the other hand, a statement made by a person subject to criminal liability, in which the declarant incriminates a third party, may be the result of the declarant's motivation and opportunity to curry favor with the authorities. *Lee, supra; Olson, supra; United States v. Riley,* 657 F.2d 1377 (8th Cir. 1981); *United States v. Love,* 592 F.2d 1022 (8th Cir. 1979); Proposed Neb. Evid. R. 804 notes (Tentative Draft 1973); Fed. R. Evid. 804, Notes of Advisory Committee on 1972 Proposed Rules. Thus, we hold that reliability of statements that fall within the hearsay exception for statements against penal interests may not be inferred, and the proponent of such evidence must carry the burden of demonstrating the trustworthiness and reliability of the statement. See, *Flores, supra; United States v. Rasmussen,* 790 F.2d 55 (8th Cir. 1986) (adding a third element to the analysis for statements against penal interests, which element requires a finding of trustworthiness for statements wherein the declarant implicates the accused, is intended to satisfy the accused's confrontation rights); *Olson, supra; State v. Palser,* 238 Neb. 193, 469 N.W.2d 753 (1991) (declining to infer reliability even though the statement

fell within the exception for statements against penal interests).

To determine whether a statement against penal interests has particularized guarantees of trustworthiness, a court must examine the totality of the circumstances surrounding the making of the statement. *Wright, supra; U.S. v. Boyce*, 849 F.2d 833 (3d Cir. 1988); *Rasmussen, supra; Palser, supra.* Particularly relevant to the determination of trustworthiness is whether the declarant was in police custody when the statement was made, whether the declarant had a motive to mitigate his own criminal liability, and whether the declarant made the statement in response to leading questions. See, *Lee v. Illinois*, 476 U.S. 530, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986); *Boyce, supra; Palser, supra.* These factors are similar to the factors this court has found relevant when considering whether a hearsay statement is sufficiently trustworthy to satisfy the residual exception to the hearsay rule. See *State v. Toney*, 243 Neb. 237, 245-46, 498 N.W.2d 544, 551 (1993) (stating that for purposes of the residual exception, a court should examine "whether the statement is oral or written; whether a declarant had a motive to speak truthfully or untruthfully, which may involve an examination of the declarant's partiality and the relationship between the declarant and the witness; whether the statement was made under oath; whether the statement was spontaneous or in response to a leading question or questions; whether a declarant was subject to cross-examination when the statement was made; and whether a declarant has subsequently reaffirmed or recanted the statement").

When a court examines the totality of the circumstances, it must keep in mind that evidence tending to corroborate the content of a hearsay statement cannot "support a finding that the statement bears 'particularized guarantees of trustworthiness.' " *Wright*, 497 U.S. at 822. Accord *U.S. v. Flores*, 985 F.2d 770 (5th Cir. 1993). The hearsay evidence "must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence. . . . " *Wright*, 497 U.S. at 822. If the circumstances indicate a likelihood that the declarant had a motive to lie, there is a greater need to cross-examine the declarant, and corroborating evidence is not a substitute for that need to explore the declarant's motivation. *Wright, supra* (limiting and explaining the Court's decision in *Lee, supra*, regarding the factual similarity between the hearsay statement and the defendant's statement to determine whether the admission of the hearsay violated defendant's confrontation rights); *Flores, supra*.

This court has addressed in *Palser, supra*, the issue of whether an out-of-court statement contained sufficient indicia of trustworthiness to satisfy the Confrontation Clause. In *Palser*, the defendant was charged with distributing a controlled substance which he allegedly sold to the out-of-court declarant. The trial court permitted the State to admit into evidence a statement that the declarant had made to the police in which he said that he obtained the drugs from the defendant. This court declined to infer the reliability of the out-of-court statement and maintained that the statement must possess " 'particularized guarantees of reliability' " to satisfy the

defendant's confrontation rights. *Palser*, 238 Neb. at 201, 469 N.W.2d at 758.

In determining that the statement in *Palser* possessed particularized guarantees of trustworthiness, this court examined the totality of the circumstances surrounding the making of the statement. Specifically, the court found that the declarant voluntarily went to the police, that the declarant was never in police custody or under arrest, that the police informed the declarant of the evidence they had against him concerning his role in the alleged drug sale, that the police informed the declarant of the criminal charges he could receive for that role, that the police told declarant he could serve as a cooperating witness or be charged for his role in the sale, that the declarant elected to be a cooperating witness and signed a cooperating witness agreement, and that the declarant wrote out his statement wherein he admitted his role in the sale. In finding that the statement was particularly trustworthy, the court reasoned that the declarant's motive to mitigate his criminal liability was absent.

In *U.S. v. Boyce*, 849 F.2d 833 (3d Cir. 1988), the district court admitted the out-of-court statement as a hearsay exception for statements against the declarant's penal interests. The declarant made the statement while he was in police custody and without the benefit of counsel. The police had advised the declarant of his *Miranda* rights before he wrote his statement. In the statement, the declarant wrote that he and two other individuals broke into a jewelry store and stole a large quantity of jewelry. The statement then described how the three left the store and that they fenced the goods. On appeal, the court of appeals held that the admission of

the statement against the appellant was prejudicial error. The court of appeals stated that it could not find any evidence in the record that would negate the declarant's motivation to lie. Moreover, the court noted, after the declarant made the statement, he entered into a favorable plea bargain with prosecutors.

In the present case, the declarant's motive to fabricate has not been eliminated. When Berry made his first statement, he was in police custody. The police had picked up Berry and brought him to the police station to be interrogated regarding the Pointer shooting. Prior to questioning, the police read Berry his *Miranda* rights and Berry signed a waiver form. The officer who interrogated Berry testified that he told Berry that Berry must be the shooter. The officer testified that he did this to scare Berry into talking. According to the officer, this conversation with Berry was not tape-recorded. The officer testified that he did not turn on the recorder until he had spent about 2 hours with Berry. The tape-recorded statement which was played for the jury involved Berry's response to direct police questioning.

A statement made to police by an alleged accomplice which incriminates another person is presumptively unreliable. The similarities between the statement and other evidence regarding the offense are irrelevant to whether the statement possesses particularized guarantees of trustworthiness. Unlike in *Palser*, the declarant here was in police custody when he made the statement, and the officer who interrogated Berry repeatedly told Berry that he "must be the shooter." Berry was not given a choice of admitting his crimes and becoming a cooperating witness; rather, he was in a position to deny the

officer's accusations that he was the shooter. Berry had a motive to make a statement which identified another person as the shooter and thus relieve himself of that liability. This motive to fabricate can be explored only by a meaningful opportunity to cross-examine the witness at trial. Berry's statement was oral and was substantially in the form of answers to direct questions posed by the interrogating police officer. Additionally, Berry has recanted his first statement at least twice since September 5, 1991.

There is not enough indication of reliability and trustworthiness to obviate the need for cross-examination of the declarant. See, *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990); *Lee v. Illinois*, 476 U.S. 530, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986); *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). The State has not demonstrated sufficient evidence regarding the circumstances surrounding the making of the statement to overcome the presumption of unreliability. We therefore find that the trial court erred in admitting the statement into evidence.

An erroneous admission of evidence is considered prejudicial to a criminal defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Toney*, 243 Neb. 237, 498 N.W.2d 544 (1993); *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). An error is harmless when the improper admission did not materially influence the jury to reach a verdict adverse to the substantial rights of the defendant. *Id.* After a review of the entire record, we cannot say that the State has proven beyond a reasonable doubt that the admission of Berry's statement was harmless. Appellant

attempted to mitigate the effect of the admission of the first statement by introducing into evidence the two other statements made by Berry. We cannot say that appellant's use of the other statements diminished the harm caused by the erroneous admission of the first statement, and appellant's use of those statements solely for the purpose of counteracting the court's error does not constitute a waiver of appellant's confrontational rights. Cf. *State v. Bromwich*, 213 Neb. 827, 331 N.W.2d 537 (1983).

Because we direct that the convictions be reversed and the cause remanded for a new trial, we do not address the other assignments of error raised by appellant.

REVERSED AND REMANDED FOR A NEW TRIAL.

APPENDIX 2

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA Plaintiff, vs. ROY T. HUGHES, Defendant.	DOC. 130 NO. 449 BILL OF EXCEPTIONS VOLUME I PROCEEDINGS & TESTIMONY (Pages 1 to 245, incl.) (Filed Feb. 16, 1993)

Tried before MICHAEL McGILL, JUDGE, and a jury, at Omaha, Nebraska, on August 27, August 28, August 31, September 1, September 2, September 3 and November 23, 1992.

APPEARANCES

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* * *

[p. 357] THE COURT: All right. The Court has reviewed these various exhibits, particularly the three statements of the defendant, Mr. Hughes. The Court in making this determination also has taken into account, and I will make reference to testimony that has been given during the course of this trial.

[p. 358] The Court understands from the authorities presented by counsel that after we got by the issues witness, yesterday on whether this is an unavailable that in determining whether a hearsay statement – and particularly we're talking now about in Exhibit D which is the 14-page statement of Nolan Berry given September 5, 1991 – the Court understands from the authorities presented by counsel that there is basically a standard of trustworthiness, and the Court in its remarks will address this in several different ways.

I've looked at the, what I would refer to as the internal integrity of the statement and then the external questions relating to the statement; that is, are there corroborating facts which would cause one to believe that the statement is trustworthy? And when I deal with the question of trustworthy, that's a determination by the Court for purposes of the basic admission of the statement. It certainly has nothing to do with what a jury might do if they are allowed to consider the statement they have to determine the credibility of this statement just as they would any other testimony or documents.

Addressing myself to Exhibit D, the statement of Nolan Berry, first of all, the Court finds generally that his relation of the facts in the statement is – [p. 359] that he is rather specific in his statements not only to the original confrontation at Tommie Rose Garden, which other witnesses have testified to, but he's rather specific in that regard. And particularly on that is the bottom of page two and the top of page three.

On page four of the document he identifies Roy Hughes as a participant. On page five he identifies – and this is, once again, talking about the internal integrity of the document – he's very specific in talking about Roy Hughes taking out a .22 caliber pistol and shooting it several times at this gentleman identified as Demond, which we know to be the decedent, Forrest Pointer.

Page six he makes a specific reference and he says that when they go to get in the car that Michael Floyd says he knows where Pointer lives. Page six also, and importantly, he identifies Michael Floyd as driving and later on in the transcript he identifies that as a red Cutlass. He identifies Roy Hughes as being in the right front seat of the car.

Page seven in addition he identifies the fourth participant as DeAndre Smith. Page seven he talks about the parties having engaged in drinking on that evening and describes the route that was taken to the [p. 360] home of Mr. Pointer. Page nine he describes very specifically the incident and talks about Demond, D-E-M-O-N-D, which is Mr. Pointer, that he walks up to the car and that he then starts backing away from the car and that Roy Hughes shoots him.

After the point of the shooting, and the following page, he is very specific – and the Court finds this evidence important – that he describes episodes where he starts crying and he says at one point, "Like I'm in trouble" After that he describes that he starts throwing up. And on page 11 he says that after becoming sick that they dropped him off at Decat's, which other testimony is indicated to be an establishment around 40th and Lake Street, I believe the testimony was.

Then on page 11 there are specific references where he says that the other individuals in the car go to Michael's girlfriend's house and that the girlfriend was in the hospital. And, once again, very specific recitation of facts by this witness, Nolan Berry. On page 12 – and, once again, I'm still talking about the internal integrity of the document – he talks about the decedent having backed up and then he dropped and that meaning after the shooting. He also says on page 12 that the decedent, Forrest Pointer, was real close. [p. 361] He says, "A foot or two away."

Now, my remarks up to this point have been talking about how specific Nolan Berry was and whether one can make a determination from such specific information whether it is reliable. And the Court does make a finding that he is so specific in his statements that the Court judges those to be reliable and trustworthy.

If we then go back and we look at external facts to the statement, the part of the statement of Nolan Berry on page nine where he talks about the defendant – I'm sorry, strike that. When he talks about the decedent that he identifies as Demond, that is, Forrest Pointer, when he

talks on page nine of him starting – that he starts backing up and then he says that he shoots him. And the part of the backing up, I think one can fairly draw a conclusion from description that the video of the scene where they had the outline of the victim in white chalk, the Court puts considerable emphasis on this description of how the decedent is shot and how he backs up and how he falls to the ground.

It seems very clear to the Court that when he came to the side of the car and when he backs up that that is definitely corroboration of the statement of Nolan Berry. An additional point of corroboration that the [p. 362] Court puts substantial emphasis on is he talks about the decedent being real close, a foot or two away. He puts him even closer than the testimony of Michael Floyd who talked about him being two to five feet away. But the point that is very, very important in the Court's mind about one or two feet away is that when we think back to the testimony of Dr. Blaine Roffman, he absolutely characterizes the wound as a contact wound. And upon the questioning by the State and upon cross-examination by counsel, he puts the location of the gun very, very close to the victim. And the Court feels that that is definitely corroboration.

The Court further states that in analyzing both the internal aspects and the external corroborating aspects of this statement that the manner of the shooting and the way that it happened, that this is a rather, in the Court's opinion, unique situation when, according to this statement and according to the testimony of Michael Floyd, that the person, the victim when he is shot, is not only shot in the face, but the gun is up very close to his face.

Now, I'm not an expert on how people are shot, but obviously there are countless incidents, particularly with someone shooting out of a car, where a person is some distance back where it is a question of a person [p. 363] being five or ten or fifteen feet or more away from the point. And I don't say that based on any scientific reading or anything. What I'm trying to get to is that Nolan Berry very specifically describes the facts, and the facts that he describes are definitely corroborated by Dr. Blaine Roffman.

The Exhibit A, the Court considered that in the question or corroboration of this statement, that is, Exhibit D. And I mentioned this to counsel yesterday. And he was asked at page 17 and 18 of that statement generally the effect of how did you settle on Roy Hughes, that is, how did you name him? And he says that it's the first name that popped into his mind. That was his explanation of how he supposedly figured out that Roy Hughes was the person.

The Court does not accept that explanation. The Court tends to believe that the statement that is Exhibit D is corroborated and, therefore, the Court finds that it is trustworthy and reliable and that it should be admitted into evidence.

The Court finally has examined the different parts of the Rule 804 . As I've already indicated, I feel that Exhibit D is against the penal interest of the witness, Nolan Berry, and that it should be admitted under subparagraph C. All right.

* * *